



***Environmental  
Planning  
Commission***

***Agenda Number: 2  
Project Number: 1004831  
Case #'s: 09EPC 40060  
December 17, 2009***

***Staff Report***

***Applicant*** City of Albuquerque City Council

***Request*** Text Amendment to §14-14-7 ROA 1994 (the Subdivision Ordinance), requiring approval of Vacation of Public Rights of Way and Public Easements to be by the City Council

***Location*** City-wide

***Zoning*** NA

***Staff Recommendation***

***That a recommendation of  
CONDITIONAL APPROVAL of a Text  
Amendment to Part §14-14-7 of the  
Subdivision Ordinance, 09EPC 40060, be  
forwarded to the City Council based on  
the Findings beginning on Page 5***

***Staff Planner***

***Jack Cloud, AICP  
Chair, Development Review Board***

***Summary of Analysis***

This proposal consists of a text amendment to Part §14-14-7 ROA 1994, the 'Subdivision Ordinance,' regarding the process for vacation, or closing, of public rights of way and easements; the proposed text amendment would require City Council approval for all such vacation requests.

Staff finds the requirement for City Council approval to be extraordinary change in procedure, given that the Council has an opportunity for review of such vacations via appeals/ due process under existing ordinances and regulations.

City-wide

City Departments and other interested agencies reviewed this application from 11/09/2009 to 11/20/2009; agency comments begin on Page 7.

## ***I. INTRODUCTION***

### ***Proposal***

This proposal is for a text amendment to §14-14-7 ROA 1994, the portion of the Subdivision Ordinance that pertains to the vacation, or closing, of public rights of way and public easements. All vacations currently may be approved by the Development Review Board (DRB) subject to a public hearing; however all decisions of the DRB are subject to appeal, which go to the City Council after a hearing and recommendation by the Land Use Hearing Officer (LUHO). The proposed text amendment would require City Council approval for all vacation of public right of way or vacation of a public easement, so that the DRB could only make a recommendation from its public hearing.

### ***Environmental Planning Commission (EPC) Role***

The EPC's task is to make a recommendation to the City Council regarding the proposed changes to the Subdivision Ordinance. The City Council is the City's legislative body with the authority to change and adopt ordinances, and the EPC is a recommending body on certain changes that affect Chapter 14 of the City Code [ZONING, PLANNING, AND BUILDING]..

### ***Background and Context***

The stated purpose of the amendment is to ensure that the City Council has the final discretionary authority for approval of these vacations. Following are comments from the City Council staff regarding the proposed text amendment:

'When the City agrees to vacate a right-of-way or easement it is determining that it should give up a potentially valuable interest in real property. In other cases where the City releases an interest in real property the City Council approves such actions as a matter of policy. State law that allows for the vacation of rights of way provides that if a roadway is not needed for public purposes, there is then a decision as to whether to vacate -- that decision is a policy decision.

The City Council has, by ordinance, elected to transfer its authority to make the determination of when to vacate property to the DRB. There is no legal problem with that delegation. The problem is that the determination to vacate a right-of-way has become a legal issue as to whether the ordinance has been complied with and the policy concerns have arguably dropped out. As you are aware, the City ordinance provides in relevant part:

"The vacation of public rights of way, private ways, or easements, whether by new plat, plat amendment, or request to vacate, shall be approved only when it is determined that:

- (1) The public welfare is in no way served by retaining the way or easement; or
- (2) There is a net benefit to the public welfare because the development made possible by the vacation is clearly more beneficial to the public welfare than the minor detriment resulting from the vacation; and in addition to divisions (1) or (2) of this division (B):

(3) There is no convincing evidence that any substantial property right is being abridged against the will of the owner of the right."

The DRB considers whether the ordinance terms are met and approves the vacation if they are complied with. The ordinance, however, does not say that rights-of-way or easements shall be vacated if the ordinance terms are met. It says that rights-of-way or easements shall not be vacated if the ordinance terms are not met. The current language of the ordinance recognizes that there may be more to the determination than simply looking at whether the ordinance language has been met. Admittedly, the DRB is charged with considering certain policy issues as it is to weigh "public welfare." But that term is not defined and if the ordinance is adopted it will be a recognition that the City Council should ultimately decide what will benefit "public welfare" along with any other policy considerations.

The DRB is a technical board with expertise in a wide range of specialized areas. It is not a policy making body. If the ordinance is adopted it will be a determination that the application of policy is best left with the Council. The technical determination of compliance with the ordinance requirements will remain with the DRB.

[In] at least one case where the City Council reversed a DRB decision to approve the vacation of an alley[, t]he party seeking the vacation filed an appeal in District Court taking the position that if the ordinance terms were met that the vacation was mandatory. Given the DRB's interpretation of the ordinance there is legal support for such an argument. That appeal was abandoned so the issue was never resolved. The ordinance amendment clarifies the fact that the City is never required to vacate a right-of-way or easement no matter what the factual determination. The final decision is always a policy call and the City Council is the appropriate body to make that call.'

## ***II. ISSUES***

### ***Section 3, Minor changes to Section 1***

There are three sections to Part §14-14-7 of the Subdivision Ordinance. The last section, §14-14-7-3 TECHNICAL CORRECTIONS, would not be changed by the proposed amendment. The first section, §14-14-7-1 RESUBDIVISION OR AMENDMENT OF PREVIOUS PLAT, has only one change by the proposed amendment, on page 2, Lines 16 and 17. This change would delete a reference to the paragraph at the top of page 2 (B) and add a new reference to section 2 of Part 7, VACATION OF PUBLIC RIGHTS OF WAY, PRIVATE WAYS AND EASEMENTS. This section 2 generally provides the requirements and procedures for review of vacation requests, and the addition of the reference for this section 2 into section 1 could be appropriate. However, this would not necessarily need to have the existing reference to the preceding paragraph (B) deleted. That paragraph (B) requires the DRB to evaluate whether the "vacation action will adversely affect contiguous land, any owner of land within the subdivision being vacated, or the interests of the City." [this is also consistent with the New Mexico State Subdivision Statute]. It is recommended that the additional reference language in section 1 be included in the text amendment, but that none of the existing language of this section 1 be deleted.

***Section 2 – Vacation not a right***

Comments from the City Council staff reference a vacation that was approved by DRB, reversed by City Council such that the vacation was denied, and that action was then appealed to District Court. The appeal took the position that if the existing ordinance terms requiring certain determinations are met (that the public welfare is not served or there is a net benefit to the public welfare, and that no substantial property right is abridged), then the approval of a vacation request should be mandatory. Council staff argues that there may be legal support for this position, so the text amendment proposes an additional paragraph (D) to section 2 to counter this interpretation on page 3, lines 17 - 21:

[(D) The vacation of public rights of way or public easements, whether by new plat, plat amendment, or request to vacate, is a discretionary act by the City and a determination that the requirements of subdivision (B) have been met is a precondition to a vacation but does not create a right to a vacation.]

Planning staff does not object to this clarification to the ordinance, and recommends it be included in the text amendment.

***– Mailed Notice to Neighborhood Associations***

Additional language to the Subdivision Ordinance is proposed with this text amendment regarding vacation procedures, and specifically mailed notice to neighborhood associations on page 4, lines 16 - 18. This is already standard practice for these vacation requests in accordance with the Neighborhood Recognition Ordinance. [§14-14-7 ROA 1994] Planning staff does not object to this clarification to the ordinance, and recommends it be included in the text amendment.

***– Required approval by City Council***

The major staff concern with the proposed text amendment is the requirement for City Council approval for all vacations of public right of way or public easements. Clearly the City Council has the authority to amend City ordinances, and to require City Council approval of these vacations if the Council determines these are to be ‘policy’ decisions. However, when the DRB was established almost 30 years ago, the City Council at that time determined that these were more of a technical decision, consistent with the subdivision process. For instance, most vacation requests for public easements are either Public Utility Easements or Public Drainage Easements. Through the planning/ vacation process the affected agencies determine what kind and size of easements are needed to serve both the function (i.e. utility or drainage) of the easement as well as to adequately serve the adjacent property. Likewise with public right of way, most vacation requests involve the size of the right of way and whether it is needed to serve adjacent property; these decisions are generally technical decisions. Regarding what would be a ‘policy’ decision would be something like the Long Range Roadway System, where City Council members help decide what and where the major roadways are to be, while the DRB considers the technical design such as whether the minimum right of way is maintained.

Comments from the City Council staff reference the release of interest in real property as requiring City Council approval, as a matter of policy. However this only applies to real property having a value of more than \$10,000; real property having a value less than that may be determined to be unessential for a municipal purpose by the administration, and this is generally the case with the vast majority of vacations.

As the legislative body for the City of Albuquerque, the City Council already has final administrative authority for actions taken by the City under the regulations of the Subdivision Ordinance. Currently, the DRB holds a public hearing for all vacations, and of course any decision by the DRB is subject to appeal. The DRB heard 29 vacation of public right of way requests in 2007, 21 in 2008, and will have heard 21 in 2009; there were 48 vacation of public easement requests in 2007, 43 in 2008, and 26 so far in 2009. However, only one or two of these vacation requests are appealed each year. This proposed text amendment would result in an extraordinary amount of paperwork and expenditure of staff (and Council) time without a clear benefit to the process.

### ***III. APPLICABLE ORDINANCES, PLANS AND POLICIES***

The applicable ordinance (Article 14 – Subdivision Regulations of Chapter 14 –Zoning, Planning and Building) is the subject of this proposed text amendment.

### ***IV. CONCLUSION***

The proposed text amendments regarding additional references and findings for DRB public hearings on vacations of public right of way and public easements could help clarify the vacation process, particularly to note that the City is not required to approve a vacation even if certain pre-conditions of the existing Subdivision Ordinance have been met.

The proposed amendment to require City Council approval for vacation of public rights of way and public easements, however, would put approximately 60 or more such applications each year into a category of process more complex than a major subdivision request, as well as most site development plans and zone map amendments.

***FINDINGS- 09EPC 40060, December 17, 2009-Text Amendment***

1. Part §14-14-7 ROA 1994 of the Subdivision Ordinance provides regulations and procedures for the vacation, or closing, of public rights of way, private ways, and easements.
2. The purpose of the proposed text amendment is to change the process for vacating public rights of way and public easements to ensure City Council approval.
3. Other portions of the proposed text amendment would codify that the approval of a vacation request is a discretionary action by the City, no matter if the existing Subdivision Ordinance pre-conditions for approval are met, plus the amendment would add references for [existing] procedures including notification of neighborhood associations.
4. The vacations of public right of way and public easements are generally technical decisions to determine if minimum subdivision standards are maintained, and thus that the public welfare is served.
5. The Development Review Board holds public hearings for vacations of public right of way and public easements consistent with public hearings for subdivisions, site development plans, and zone map amendments; this includes requiring neighborhood association notification, printing a legal advertisement in the local newspaper, posting of signs, and mailed notice, along with distribution to other City departments for review and comment.
6. The City of Albuquerque processed 77 applications for such vacations in 2007, 64 applications in 2008, and 47 applications to-date in 2009.
7. Requiring City Council approval for vacations of public right of way and public easements would put 50 - 70 such applications each year into a category of process more complex than a subdivision request as well as most site development plans and zone map amendments.

***RECOMMENDATION***

**That a recommendation of CONDITIONAL APPROVAL of O-09-91/ Text Amendments to the Subdivision Ordinance Part §14-14-7 be forwarded to the City Council based on the preceding Findings and subject to the following Conditions of Approval.**

***CONDITIONS OF APPROVAL- 09EPC 40060, December 17, 2009-Zoning Code Text Amendments***

1. That the existing language in Section 1 of Part §14-14-7 of the Subdivision Ordinance be retained [not deleted] and that the proposed new language in Section 1 [page 2, line 17] be included in the text amendment.
  2. That new paragraph (C) in Section 2 of Part §14-14-7 of the Subdivision Ordinance [page 3, lines 12 -16] not be included not be included in the text amendment, and that new paragraph (D) in Section 2 [page 3, lines 17 -21] be included in the text amendment and re-lettered as paragraph (C).
  3. That all other changes on page 3 not be included in the text amendment.
  4. That all other changes on pages 5 and 6 not be included in the text amendment.
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***Jack Cloud, AICP  
Chair, Development Review Board***

cc: City of Albuquerque, City Council, Attn: Bruce Thompson, P.O. Box 1293, Albuquerque, NM 87102  
City of Albuquerque, Planning Department, P.O. Box 1293, Albuquerque, NM 87102

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## ***CITY OF ALBUQUERQUE AGENCY COMMENTS***

### ***PLANNING DEPARTMENT***

#### **Zoning Code Services**

No comment.

#### **Office of Neighborhood Coordination**

City Wide

11/19/09 – was published in the “Neighborhood News” newsletter and is online in the Newsletter

11/30/09 - will be e-mail to Neighborhood Representatives - siw

#### **Long Range Planning**

### ***CITY ENGINEER***

#### **Transportation Development Services**

##### ***Findings***

- Currently, the process for Vacation of Public Rights of Way, Private Ways and Easements is clearly defined in 14-14-7 of the Subdivision Regulations.
- Currently, City Council has final discretionary authority to approve the vacation of public rights-of-way as outlined in the Subdivision Regulations but has delegated the administration of this action to the Development Review Board (DRB). However, a DRB determination can be appealed to City Council who ultimately would make a final decision regarding the DRB determination.

##### ***Recommendation***

- Maintain the current procedures for Vacation of Public Rights of Way, Private Ways and Easements as defined in 14-14-7 of the Subdivision Regulations.

#### **Traffic Engineering Operations**

#### **Hydrology**

- The Hydrology Section objects to the ordinance revision as written based on the following reasons:
  1. Public drainage easements and public utility easements should be established or vacated for technical reasons. The DRB is the technical review board.
  2. The appeal process is not clearly addressed.

### ***DEPARTMENT of MUNICIPAL DEVELOPMENT***

#### **Transportation Planning**

- Reviewed, and no comments regarding on-street bikeways, off-street trails or roadway system facilities.



**Traffic Engineering Operations (Department of Municipal Development):**

- No comments received.

**Street Maintenance Operations (Department of Municipal Development):**

- No comments received.

**New Mexico Department of Transportation (NMDOT):**

- No comments received.

**RECOMMENDED CONDITIONS FROM CITY ENGINEER, MUNICIPAL DEVELOPMENT  
and NMDOT:**

Conditions of approval for the proposed Text Amendment to the Subdivision Ordinance shall include:

- a. Maintain the current procedures for Vacation of Public Rights of Way, Private Ways and Easements as defined in 14-14-7 of the Subdivision Regulations.

***WATER UTILITY AUTHORITY***

**Utility Services**

***ENVIRONMENTAL HEALTH DEPARTMENT***

**Air Quality Division**

**Environmental Services Division**

***PARKS AND RECREATION***

**Planning and Design**

**Open Space Division**

Open Space has no adverse comments

**City Forester**

***POLICE DEPARTMENT/Planning***

No crime prevention of CPTED comment to the proposed text amendment at this time.

***SOLID WASTE MANAGEMENT DEPARTMENT***

**Refuse Division**

NO ADVERSE COMMENTS

***FIRE DEPARTMENT/Planning***

***TRANSIT DEPARTMENT***

Adjacent and nearby routes	N/A
Adjacent bus stops	N/A
Site plan requirements	None
Large site TDM suggestions	N/A
Other information	None.

***COMMENTS FROM OTHER AGENCIES***

***BERNALILLO COUNTY***

***ALBUQUERQUE METROPOLITAN ARROYO FLOOD CONTROL AUTHORITY***

Reviewed, no comment.

***ALBUQUERQUE PUBLIC SCHOOLS***

This amendment will have no adverse impacts to the APS district.

***MID-REGION COUNCIL OF GOVERNMENTS***

***MIDDLE RIO GRANDE CONSERVANCY DISTRICT***

***PUBLIC SERVICE COMPANY OF NEW MEXICO***

No comments.